

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

JOANNE M. ROYER,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF
MASSACHUSETTS, INC., BLUE CROSS
BLUE SHIELD LONG-TERM
DISABILITY BENEFIT PLAN, a/k/a
OMNIBUS WELFARE BENEFITS
PLAN, KEMPER NATIONAL
SERVICES, INC., BROADSPIRE
SERVICES, INC., AND SHELDON
MYERSON, M.D.,

Defendants.

**CIVIL ACTION NO:
NO: 05-CV-10448-GAO**

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS COUNTS I AND II OF THE
PLAINTIFF'S SECOND AMENDED COMPLAINT**

Kemper National Services, Inc. ("KNS"), Broadspire Services, Inc. ("Broadspire") and Sheldon Myerson, M.D. ("Dr. Myerson"), defendants in this matter, for their Memorandum in Support of their Motion to Dismiss Counts I and II of the plaintiff's Second Amended Complaint state as follows:

I. INTRODUCTION

The plaintiff has filed a multi-count second amended complaint against various defendants seeking short-term and long-term disability benefits from plans sponsored by Blue Cross Blue Shield of Massachusetts ("BCBS"). KNS and Broadspire were claims administrators for the STD and LTD plans. The subject complaint does not (and cannot) allege that either KNS

or Broadspire funded plan benefits or were liable to pay any benefits under the terms of the subject ERISA Plan. Dr. Myerson was an independent peer reviewer who rendered opinions to KNS and Broadspire regarding medical records submitted to him for review. Dr. Myerson likewise did not fund any plan benefits, nor was he liable for the payment of any benefits under the terms of the subject ERISA Plan.

For reasons stated more fully below, neither KNS, Broadspire nor Dr. Myerson are proper defendants in an action seeking ERISA Plan benefits. As such this Court should dismiss Counts I and II as to those defendants.

II. ARGUMENT

The proper defendants in an action for ERISA Plan benefits are the ERISA Plan and the employer, but only if the employer maintains control over the administration of the Plan. *See Daniel v. Eaton Corp*, 839 F.2d 263, 266 (6th Cir. 1988). In no event is a claims administrator a proper defendant in an action seeking ERISA Plan benefits. *See Jass v. Prudential Healthcare Plan*, 88 F.3d 1482, 1490 (7th Cir. 1996)(also holding that health care provider retained by claims administrator is not a proper defendant). *See also Gelardi v. Pertec Computer Corp*, 761 F.2d 1323, 1324 (9th Cir. 1985); 29 U.S.C. §1132(d)(2)(“Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter”).

III. CONCLUSION

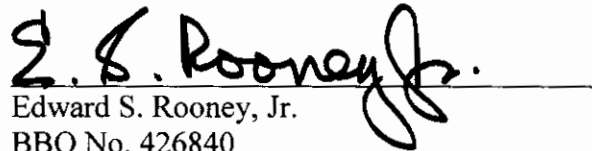
Therefore, because KNS, Broadspire and Dr. Myerson are not proper defendants in an action for ERISA Plan benefits, this Court should dismiss Counts I and II of the plaintiff's second amended complaint against those defendants pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

KEMPER NATIONAL SERVICES, INC.,
BROADSPIRE SERVICES, INC. and SHELDON
MYERSON, M.D.

By its attorneys:

DATED: August 4, 2005


Edward S. Rooney, Jr.

BBO No. 426840

ECKERT SEAMANS CHERIN
& MELLOTT, LLC

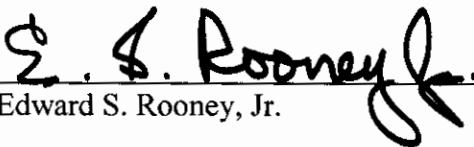
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by overnight mail this 4th day of August, 2005.


Edward S. Rooney, Jr.